IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-20081

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC. AND DIANN SIMIEN

Defendants-Appellants,

vs.

VERA CHAPMAN AND KRYSTAL HOWARD,

Plaintiffs-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
Houston Division

PETITION FOR REHEARING EN BANC

WILLIE & ASSOCIATES, P.C.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the persons and entities listed below have an interest in the outcome of this case. This representation is made in order that the Judges of this Honorable Court may evaluate possible disqualification or recusal.

1. A.S.U.I. Healthcare and Development Center, Inc., the Defendant-Appellant.
2. Diann Simien, the Defendant-Appellant.
3. Vera Chapman, the Plaintiff-Appellee.
4. Krystal Howard, the Plaintiff-Appellee.
5. Joseph R. Willie, II, D.D.S., J.D., attorney for the Defendants-Appellants.
6. Lori Chambers Gray, Esquire, attorney for the Defendants-Appellants.

7. Stacy M. Allen, Esquire, attorney for the Defendants-Appellants.

8. Mark Siurek, Esquire, attorney for the Plaintiffs-Appellees.

9. Patricia Haylon, Esquire, attorney for the Plaintiffs-Appellees.

10. Willie & Associates, P.C., Dr. Willie's law firm.

11. Law Offices of Lori Gray & Associates, Attorney Gray and Attorney Allen's law firm.

12. Warren & Siurek, L.L.P., Attorney Siurek and Attorney Haylon's law firm.

WILLIE & ASSOCIATES, P.C.

By:/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

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STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Bobby v. Bies, 129 S.Ct. 2145 (2009).

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

Roussell v. Brinker, 441 Fed.Appx. 222 (5th Cir. 2011).

Sandoz v. Cingular Wireless, L.L.C., 553 F.3d 913 (5th Cir. 2008).

Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002).

Terrell v. DeConna, 877 F.2d 1267 (5th Cir. 1989).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

1. This appeal involves an important question f law that is of first impression in this Court: Does the filing of virtually identical collective actions in Fair Labor Standards Act ("FLSA") cases satisfy the written "opt in" requirement of 29 U.S.C. § 216(b), such that the doctrine of collateral estoppel will apply and if it does, did the panel so depart from the guidelines mandated by the Supreme Court in Bies and the holdings of this Court as announced in Sandoz and Terrell.

2. Whether the panel so departed from the guidelines mandated by the Supreme Court as they relate to the "companionship exemption" in FLSA cases so as to be in conflict with the law espoused in Long Island.

WILLIE & ASSOCIATES, P.C.

By:/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

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STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. The panel did not give the Order of Partial Dismissal and the Final Judgment the preclusive effect under the doctrine of collateral estoppel, as it was required to by binding and controlling case law precedent issued by the Supreme Court and this Court.

2. The Defendants properly preserved their "companionship exemption" defense by proffering their defense in their Rule 12(b)(6) motion to the trial court.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Appellees filed their Original Collective Action Complaint in the United States District Court, Southern District of Texas, Houston Division, bearing Civil Action No. H-11-3025 on August 18, 2011. The presiding judge was the Honorable Gray H. Miller. (ROA.8-15.)

On December 1, 2011, the district court denied the Appellants' Rule 12(b)(6) Motion to Dismiss. (R.O.A. 59-60.) On December 8, 2011, the district court denied the Appellants' Motion for Reconsideration. (ROA.79.)

On August 21, 2012, the district court entered its Memorandum Opinion and Order granting in part and denying in part Appellees' Motion for Summary Judgment. (ROA.211-224.) On October 10, 2012, the district court denied the Appellants' Motion for Reconsideration. (ROA.277.)

On November 5, 2012, trial commenced before the bench and on November 6, 2012, the bench trial concluded. (ROA. 537-647, 648-700.)

On February 6, 2013, the district court entered its Memorandum Opinion, Order and Findings of Fact and Conclusions of Law (ROA. 481-498.) On February 6, 2013, the district court entered its Final Judgment in favor of the Appellees. (ROA. 499.)

The Appellants timely filed their Notice of Appeal on February 12, 2013. (ROA.500-501.)

February 3, 2014, the Court entered its per curiam opinion affirming the judgment of the district court.

On February 11, 2014, the Appellants timely filed their Petition for Rehearing En Banc.

STATEMENTS OF FACTS

It is undisputed that the Defendant, A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC., is a domestic non-profit corporation doing business in the State of Texas. Additionally, the Defendant, A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC., is a Medicaid Provider for the Provision of Home and Community-Based Services Program with the Texas Department of Aging and Disability Services ("DADS").The corporation provides residential based care for physically and mentally disabled individuals. First and foremost, it is uncontroverted and undisputed that the Plaintiffs were employed by the corporation and not the personal employees of the individual Defendants, Kim McLemore and Diann Simien. The Plaintiff's in this case have did not plead the theory alter ego to pierce the corporate veil and have not pled that the individual Defendants committed actual fraud.

The Plaintiffs judicially admit that they are domestic service employees who provide companionship services to the physically and mentally disabled and that they are employed by a third-party ("A.S.U.I.") as opposed to a family or household recipient.

Specifically, Plaintiffs made the following factual allegations: 1) The direct caregivers (Plaintiffs) are responsible for assisting the clients with their personal care and hygiene, ensuring medications are taken on schedule, cooking

meals and other household functions, 2) These direct caregivers, including the Plaintiffs, work in a home from 2:00 p.m. until 9:00 a.m. when the clients are taken to a day facility. The Plaintiffs and other similarly situated employees are not paid at all for all of the hours worked in the home after 10:00 p.m. which is considered "down time" and is "off-the-clock," 3) As a result of this schedule, direct caregivers (Plaintiffs) regularly work in excess of forty (40) hours per week. However, they are not paid overtime compensation for all hours worked in excess of forty (40) hours per week. Even if these factual allegations are assumed to be true, they do not show a right to relief.

ARGUMENT AND AUTHORITIES

A. The panel violated the doctrine of stare decisis by departing from the mandates of the Supreme Court and this Court concerning the applicability of the doctrine of collateral estoppel in a FLSA case.

The panel, in its opinion held, "The final judgment therefore was not an adjudication of the issues presented in the instant case. See Chapman, Et Al. v. A.S.U.I. Healthcare, Et Al., No. 13-20081, slip op. at 2 (5th Cir. Feb. 3, 2014) (per curiam). It is respectfully submitted that the panel has made a factually incorrect statement as it pertains to the appellate record in this case.

On August 18, 2011, the Plaintiffs filed their Original Collective Action Complaint under the FLSA. (ROA.8-15.) On January 10, 2012, a virtually identical collective action under the FLSA was filed and styled Ovlyn Lee v. A.S.U.I. Healthcare and Development Center, Et Al; In the Southern District of Texas,

Houston Division. The presiding judge was the Honorable Lynn N. Hughes. The case bears Cause No. H-12-0082. (ROA.432-441.) The Court, en banc, is requested to take judicial notice of both collective action complaints.

The record clearly reflects that on April 2, 2012, Judge Hughes issued a Partial Dismissal which unambiguously held that A.S.U.I. Healthcare and Development Center was not Ovlyn Lee's employer. (ROA.442.) This was and is an adjudication on the merits of a portion of Ovlyn Lee's FLSA claim. It is also undisputed that Ovlyn Lee's FLSA claims were prosecuted as a "collective action" and involved the same Defendants and an almost identical set of operative facts as the case at bar. (R.O.A.432-441.) This set of circumstance made the rest of Ovlyn Lee's **overtime and damages claims** under the FLSA legally untenable and she abandoned her overtime and damages claims on July 6, 2012, by written stipulation. (ROA.461-462.) On October 19, 2012, Judge Hughes entered a Final Judgment that Ovlyn Lee takes nothing from A.S.U.I Healthcare and Development Center, Inc. (ROA.443.) This action merged the interlocutory Partial Dismissal into the Final Judgment and was applicable to **all** claims asserted by Ovlyn Lee. The Final Judgment was not appealed to this Court and is the current state of the law concerning collective actions under the FLSA as they relate to A.S.U.I.

The Appellees and the panel have sought to assail and challenge the finality and preclusive effect of Judge Hughes' Partial Dismissal and Final Judgment, in contravention to applicable case law and rules of procedure. Judge Hughes' Partial

Dismissal and Final Judgment were entered pursuant to the provisions of FED. R. CIV. P. 41(b), which operates as an adjudication on the merits. Cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (rules of finality treat dismissal on statute of limitations grounds as a judgment on the merits).

The two FLSA collective action cases at issue have the same alleged employer, similarly-situated employees and the same set of operative facts. Although an issue of first impression in this Court, the Defendants contend that the collective action that the Plaintiffs filed would meet the written "opt in" requirements of 29 U.S.C. § 216(b), which in turn, would make collateral estoppel available to the Defendants. See Sandoz v. Cingular Wireless, L.L.C., 553 F.3d 913, 916-917 (5th cir. 2008); Roussell v. Brinker, 441 Fed.Appx. 222, 227 (5th Cir. 2011); Heirs of Guerra v. United States, 207 F.3d 763, 766-767 (5th Cir. 2000); Swate v. Hartwell, 99 F.3d 1282, 1289-1290 (5th Cir. 1996); Hendrick v. Avent, 891 F.2d 583, 586-589 (5th Cir. 1990).

This Court in Roussell, 441 Fed.Appx. at 227, held:

> Section 216(b) collective actions are intended "to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer."

(Emphasis added.)

Collateral estoppel (issue preclusion) bars the relitigation of determinations necessary to the ultimate outcome of a prior proceeding. Bobby v. Bies, 129 S.Ct. 2145, 2149 (2009). Moreover, collateral estoppel (issue preclusion) bars successive litigation

of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and is essential to the judgment. Id. at 2152.

Lastly, neither Judge Hughes nor Judge Miller ever decertified the class in both cases and they both proceeded as collective actions. See Roussell, 441 Fed.Appx. at 227. The Defendants claim that the doctrine of collateral estoppel bars the Plaintiffs subsequent "collective action" suit and more than meets the "three-prong" test announced by this Court in Terrell v. DeConna, 877 F.2d 1267, 1270-1272 (5th Cir. 1989).

B. The panel violated the doctrine of stare decisis by departing from the mandates of the Supreme Court and this Court concerning the de novo review with regard to the denial of the Defendants' Rule 12(b)(6) motion.

The panel, in its opinion, is totally incorrect that the Defendants did not proffer their "companionship exemption" defense in the trial court and did not argue said defense in its briefs. The Court, en banc, is requested to take judicial notice of Defendants' Rule 12(b)(6) Motion to Dismiss as well as the Defendants' briefs that are on file. (ROA.24-38,46-48,49-58; Brief of Appellants, pp. 12-16; Reply Brief of Appellants, pp. 3- 6.) The appellate record is replete with evidence that the exemption is applicable as the Plaintiffs were companionship service providers contemplated by 29 C.F.R. § 552.3. As a matter of law, FED. R. APP. P. 28(a)(9) is totally not applicable to the case at bar.

The denial of a Rule 12(b)(6) motion is to be reviewed de novo. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564-570

(2007). It is the contention of the Defendants that the panel gave "short shrift" to the Defendants' "companionship exemption" defense and did not conduct the proper appellate review.

In Long Island, the Supreme Court recognized the companionship services exemption applied to workers contracting with a third-party agency to provide care to consumers. See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007). Plaintiffs, in their complaint, judicially admitted they were direct caregivers providing services within the purview of the companionship exemption, including assisting the clients with their personal care and hygiene, ensuring medications are taken on schedule, cooking meals and other household functions. (ROA.8-15.)

Moreover, Welding, the case upon which the panel and the Plaintiffs heavily rely, is not binding on the Fifth Circuit and has not been adopted by all of the federal circuits. See generally Welding v. Bios Corp., 353 F.3d 1214 (10th Cir. 2004). However, if the Court, en banc, chooses to follow the analytical framework outlined by the Welding court, that case acknowledges the term "private home" contained in 29 C.F.R. § 552.3 encompasses more than the traditional home; rather, it applies to housing situations along a continuum:

> At one end of the continuum is a traditional family home in which a single family resides, which clearly constitutes a private home. At the other end of the continuum is "an institution primarily engaged in the care of the sick, the aged, the mentally ill . . . which clearly [does] not constitute a private home. In between lie a variety of living arrangements, many

> which may constitute "private homes' for the purposes of the companionship services exemption."

Welding, 353 F.3d at 1218 (citations omitted).

To determine where in the continuum a particular residence lies and if it constitutes a private home under the companionship services exemption, the Court in Welding constructed six factors: 1) whether the client lived in the living unit as his private home prior to receiving services from the provider, 2) who owns the living unit, 3) who manages and maintains the residence, 4) whether the client would be allowed to live in the unit if the client were not contracting with the provider, 5) the relative difference in cost/value of the services provided and the total cost of maintaining the living unit and, 6) whether the service provider uses any part of the residence for the provider's own business. Id. at 1219-1220.

The panel and the Plaintiffs relied heavily on the fact that A.S.U.I. consumers did not live in the living unit as their private home before beginning to receive services and that their names were not on the lease. However, Welding states that no single factor is dispositive. Id. at 1218. Moreover, the remaining factors weigh in favor of the Defendants.

The evidence and case law tendered concerning the Defendants' Rule 12(b)(6) motion more than sets out that the Plaintiffs were direct caregivers that are subject to the companionship exemption defense. (ROA.28-38,51-58.)

Additionally, the evidence presented by both the Defendants and the Plaintiff's raise a genuine fact issues as to whether the

companionship exemption is applicable and whether the living units were the clients private homes. (ROA.119,129,148-158, 161-165,186-187,190.) See also 29 U.S.C. § 213(a)(15); 29 C.F.R § 552.3. This case should be decided by the trier of fact that was demanded, the jury. It was inappropriate for the panel to affirm the denial of Plaintiffs' Rule 12(b)(6) motion and the granting of the Plaintiffs' motion for summary judgment.

CONCLUSION

For the forgoing reasons, the Appellants request that the opinion and judgment of the panel vacated, that the Court, en banc, reverse the final judgment of the district court and render judgment in favor of the Defendants or, in the alternative, remand the case to the district court with instructions to order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the CM/ECF system to Mark Siurek, 3334 Richmond Avenue, Suite 100, Houston, Texas 77098 and to Sarah K. Marcus, 200 Constitution Avenue, Room N-2716, Washington, D.C. 20210, on the 11th day of February, 2014.

/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief uses a monospaced typeface and contains 300 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 3, 2014
Lyle W. Cayce
Clerk

No. 13-20081

VERA CHAPMAN; KRYSTAL HOWARD,

Plaintiffs-Appellees

v.

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER; DIANN SIMEN,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CV-3025

Before REAVLEY, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

The principal issue in this Fair Labor Standards Act ("FLSA") case is whether Plaintiff-Appellees Vera Chapman and Krystal Howard were employees of Defendants-Appellants A.S.U.I. Healthcare and Development Center and Diann Simien[1] (collectively "ASUI"). The district court held on summary judgment that they were employees, rather than independent

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although Simien's name is spelled "Simen" on the district court docket sheet, we adopt the spelling used in the Appellant's brief.

contractors, and therefore entitled to be paid for overtime. The court conducted a bench trial as to damages. We AFFIRM.

Chapman and Howard worked as direct caregivers in group homes for persons with mental disabilities. ASUI contracted with the state to provide the assistive services, and it leased the homes. Chapman and Howard's duties included cooking, cleaning, and assisting the clients with medication. The plaintiffs began their shifts at approximately 3:00 p.m. and worked until 9:00 a.m. the next morning. Although they stayed at the group homes overnight, they were not paid for all of the hours on duty, specifically the "downtime" from 10:00 p.m. to 6:00 a.m. They filed the instant suit against ASUI to recover for unpaid overtime wages in excess of forty hours worked per week. *See* 29 U.S.C. §§ 206(a), 207(a).

ASUI contends first that the instant suit is barred by collateral estoppel because of a similar suit filed in the Southern District of Texas that resulted in a take nothing judgment against the plaintiff. The plaintiff in that case made a claim not only for overtime pay but also for personal injuries. The record shows that the plaintiff subsequently abandoned the FLSA overtime claim. The final judgment therefore was not an adjudication of the issues presented in the instant case. *See Matter of Braniff Airways*, 783 F.2d 1283, 1289 (5th Cir. 1986) (party seeking to apply collateral estoppel must prove that an issue was actually litigated in a prior action); *see also Nichols v. Anderson*, 788 F.2d 1140, 1141-42 (5th Cir. 1986).

ASUI next contends that the district court erroneously found that the plaintiffs were employees because, *inter alia*, Simien testified that the plaintiffs were hired as independent contractors, and they signed contracts acknowledging that status. Neither a defendant's subjective belief about employment status nor the existence of a contract designating that status is dispositive. *See Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th

Cir. 1983). Rather, we look to multiple factors to assess the "economic reality" of whether the plaintiff is so dependent on the alleged employer that she is an employee or is so independent that the plaintiff essentially is in business for herself. *See Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir. 1976). The factors include the "degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required." *Pilgrim Equip.*, 527 F.2d at 1311.

The record shows that ASUI controlled all the meaningful aspects of the employment relationship. ASUI hired Chapman and Howard, assigned them to their respective group homes, set their work schedule, and determined how much to pay them on an hourly basis and when to increase their hourly rate. There was no opportunity for the plaintiffs to profit beyond their hourly wage, and they were not at risk to suffer any capital losses. Both plaintiffs worked for ASUI for multiple years, although Chapman had two short gaps in her employment. The plaintiffs' only investment in the business was the purchase of their uniforms. ASUI, on the other hand, contracted with the state to provide the services; operated a dayhab facility for the clients' day time use; and maintained a central office headquarters. Any lack of supervision by ASUI as to how Chapman and Howard should go about cooking and cleaning does not transform the plaintiffs into independent contractors. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). The economic reality test does not show that the plaintiffs were so independent of ASUI that they were in business for themselves. *See Pilgrim Equip.*, 527 F.2d at 1311-14. The district court did not err by concluding that they were employees.

We also conclude that under a similar economic reality test for determining employer status, the district court did not err by concluding that Diann Simien, ASUI's vice president and program manager, was a statutory employer for purposes of the FLSA. *See* 29 U.S.C. § 203(d); *Martin v. Spring*

Break '83 Productions, L.L.C., 688 F.3d 247, 251 (5th Cir. 2012). To determine whether an individual or entity is an employer, we look to who has operating control over the employees, and we consider "whether the alleged employer: '(1) possessed the power to hire and fire employees; (2) supervised or controlled employee work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employee records.'" *Gray v. Powers*, 673 F.3d 352, 354-55 (5th Cir. 2012) (citation omitted).

The district court correctly determined that Simien exercised substantial control over management of the plaintiffs' employment, set the plaintiffs' rate of pay, and personally reviewed their hours and compensation. Chapman and Howard testified that Simien hired them both, assigned them to their group homes, and decided when to raise their hourly pay. She also scheduled them to work when needed to cover for employees who did not show up. Howard testified that Simien told her she would not be paid for certain hours. Simien's own testimony showed that on various occasions she exercised authority and control by authorizing the billing specialist to pay the direct caregivers for certain time. Simien also testified that she ensured criminal background checks were performed on new hires and that letters of reference were obtained. Based on the economic realty test, the record supported the district court's finding that Simien exercised operating control over the plaintiffs.

We are not persuaded by ASUI's argument that the FLSA's companionship services exemption applies in this case. *See* 29 U.S.C. § 213(a)(15). ASUI offered no evidence as to this exemption in opposition to the plaintiff's summary judgment motion, which ordinarily precludes review. *See Colony Creek, Ltd. v. Resolution Trust Corp.*, 941 F.2d 1323, 1326 (5th Cir. 1991); *see also Bell v. Thornburg*, 738 F.3d 696, 702 (5th Cir. 2013); Fed. R. Civ. P. 56(c)(1). ASUI's further attempt to incorporate by reference arguments it made in its motion to dismiss is also impermissible. *See Yohey v. Collins*,

985 F.2d 222, 225 (5th Cir. 1993); Fed. R. App. P. 28(a)(9). Moreover, the record shows that the exemption does not apply because the plaintiffs were not working in private homes within the meaning of the FLSA. *See* 29 C.F.R. § 552.3; *see also Welding v. Bios Corp.*, 353 F.3d 1214, 1219-20 (10th Cir. 2004). Although the clients do reside in the living units, albeit in groups of three, these group homes are maintained primarily to facilitate provision of the assistive services. *See Welding*, 353 F.3d at 1219. But for their receipt of assistive services from ASUI, the clients would not necessarily be living in these units. ASUI's reliance on *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339 (2007), is inapposite as that case provides no assistance for determining what is a "private home" for purposes of the companionship services exemption.

ASUI next challenges the district court's admission in the bench trial of summary exhibits used to determine damages. Summaries are generally admissible when "(1) they are based on competent evidence already before the jury, (2) the primary evidence used to construct the charts is available to the other side for comparison so that the correctness of the summary may be tested, (3) the chart preparer is available for cross-examination, and (4) the jury is properly instructed concerning use of the charts." *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001); *see* Fed. R. Evid. 1006. The summaries here were based on ASUI's own records and/or the plaintiffs' testimony. The district court was fully able to compare the summaries with the primary evidence. Although ASUI correctly argues that the chart preparer was not available for cross-examination, this was a bench trial, not a jury trial. ASUI was able to argue about claimed inaccuracies in the evidence, and the district court expressly took those claims into account. ASUI fails to show that the district court abused its discretion. *See Triple Tee Golf, Inc. v. Nike, Inc.*,

485 F.3d 253, 265 (5th Cir. 2007) (evidentiary rulings are reviewed for abuse of discretion).

ASUI further argues that the district court erroneously declined to exercise its discretion to omit an award of liquidated damages. *See* 29 U.S.C. § 216(b); *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1030 (5th Cir. 1993) (Section 216(b) "mandates the award of liquidated damages in an amount equal to actual damages following a determination of liability."). Although the district court has discretion not to award liquidated damages, the employer must first satisfy the court that it acted in good faith and with a reasonable ground for believing it was not violating the FLSA. *See* 29 U.S.C. § 260; *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1263 (5th Cir. 1986). ASUI has not met this "substantial burden." *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979). The only evidence bearing on ASUI's good faith was Simien's bare agreement with counsel that ASUI had spoken to an attorney and an unnamed consultant when forming its opinion that the plaintiffs were not employees. No further explanation or discussion was provided about any investigation by ASUI into the plaintiffs' employment status. We conclude that the district court did not abuse its discretion by refusing to omit a liquidated damages award. *See, e.g., Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1415 (5th Cir. 1990).

AFFIRMED.